IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES ex rel.	§	
MATTHEW A. PEQUIGNOT,	§	
Relator,	§	
v.	§	Civil Action No. 2:08-CV-222
THE GILLETTE COMPANY AND THE PROCTER & GAMBLE COMPANY,	§	
Defendants.	§	

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS THE AMENDED COMPLAINT

Defendants The Gillette Company and The Procter & Gamble Company (collectively, "Defendants"), submit this reply in support of their motion to dismiss (Dkt. # 23).

The Federal Circuit and other courts have acknowledged false marking as a species of fraud, and Rule 9(b) applies to all fraud claims. In fact, on May 13, 2009, just a few weeks after Defendants filed their motion, Judge Armstrong of the United States District Court for the Northern District of California expressly confirmed this precedent by dismissing a false marking complaint under 35 U.S.C. § 292 because it failed to comply with Rule 9(b) standards.

Relator did not address Judge Armstrong's decision in his opposition on June 1, 2009, but, in any event, he identified no reason that Rule 9(b) should not apply to his claims – indeed, he set out several reasons why it should. Even a brief look at Relator's amended complaint makes it clear that he failed to provide any facts to support thousands of "copy-and-paste" allegations. The very examples Relator identified in his opposition prove that his allegations are not pled with sufficient particularity and should be dismissed. Making matters worse, Relator's opposition relied on incorrect legal theories.

No matter what the substantive law of false marking is argued to be, Relator's speculative and conclusory allegations fall short of Rule 9(b) standards.

I. RELATOR HAS FAILED TO ESTABLISH THAT FALSE MARKING IS NOT A SPECIES OF FRAUD; AS SUCH, RULE 9(B) APPLIES AS A MATTER OF LAW

This much is indisputable: courts have recognized that false marking is a species of fraud and that Rule 9(b) applies to all allegations of fraud. Indeed, just a few weeks after Defendants filed their motion, Judge Armstrong expressly confirmed that "[t]he false marking statute is a fraud-based claim, which is subject to the pleading requirements of [Rule] 9(b)." *Juniper Networks v. Shipley*, No. C 09-696 SBA, 2009 WL 1381873, at *4 (N.D. Cal. May 14, 2009) (Exh. 1.)

Nonetheless, Relator asked this Court to find to the contrary, inviting the Court to ignore the Federal Circuit's recognition of false marking as a species of fraud, to blindly follow distinguishable cases, and to hold Relator (and others) to a standard allowing thousands of speculative and conclusory allegations. The Court should decline this invitation to error.

A. False Marking Is A Species Of Fraud Subject to Rule 9(b)

Defendants identified decisions from numerous courts, including the Federal Circuit, that have identified false marking as a species of fraud, but Relator tried to explain them all away as *dicta*. As demonstrated by *Juniper Networks*, Defendants were correct: false marking **is** a species of fraud and, as such, it **is** subject to Rule 9(b).

In *Juniper Networks*, the defendant was accused of falsely marking a website with the numbers of patents that allegedly did not cover or protect the website's operation. *Juniper Networks*, 2009 WL 1381873 at *1-2. (Exh. 1.) The court held that "[t]he false marking statute is a fraud-based claim, which is subject to the pleading requirements of Federal Rule of Civil Procedure 9(b)." *Id.* at *4 (citations omitted). The court dismissed plaintiff's conclusory allegations as insufficient under 35 U.S.C. § 292 and Rule 9(b). *Id.*

Juniper Networks is consistent with other precedent cited by Defendants. The only time the Federal Circuit has ever addressed the required intent under 35 U.S.C. § 292 in any depth, it specifically framed the issue as one of "fraudulent intent." *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005). Defendants quoted *Clontech* for this exact proposition, *see* Mot. at 2, a citation that Relator failed to acknowledge. *Clontech* is the Federal Circuit's confirmation that false marking is a species of fraud, a point unchallenged by Relator.[1]

Defendants' other precedent expressly links false marking to fraud. Relator characterized *Scharmer* as a case about representations to the PTO. Opp. at 7. That is incorrect. The *Scharmer* plaintiff relied on defendant's representations to the PTO as **evidence** "contrary to [its] present argument" that it reasonably believed the markings to be true. *United States ex rel. Scharmer v. Carrollton Mfg.*, 377 F. Supp. 218, 220 (N.D. Ohio 1974). The court, however, identified independent **evidence** supporting that same "present argument," namely, that "patent counsel had advised the company to utilize the **patent marking**, which would tend to blunt the contention that the company itself was perpetrating a **conscious fraud**." *Id.* at 221 (emphases added). The "conscious fraud" was "the patent marking," not the alleged representations to the PTO. *Id.* And, Relator missed the point of *Haynes v. R.H. Dyck, Inc.*, No. 2:06-CV-2944-MCE-EFB, 2008 U.S. Dist. LEXIS 910, at *4 (E.D. Cal. Jan. 4, 2008): while the recognition of false marking as fraud arose in the context of privilege, it does not erase judicial acknowledgment of false marking as fraud, as Relator is forced to concede.

Defendants cited and correctly distinguished the two cases upon which Relator now relies. *See* Mot. at 3 n.6. Indeed, *Juniper Networks* distinguished *Astec* on the same grounds as Defendants, namely, that *Astec* cited no compelling authority and provided no analysis to support the conclusion that false marking is not a fraud claim subject to Rule 9(b). *Juniper Networks*, 2009 WL 1381873 at *4 n.3.[2] (Exh. 1.)

Defendants have provided precedent that expressly holds that false marking claims are subject to Rule 9(b) standards, and other precedent that was not addressed by either *Astec* or

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[1] Relator tried to divert the Court's attention from *Clontech* by claiming that "*Norton* [and] *Seven Cases* do not concern Section 292 at all." Opp. at 6. Not true. *Clontech* relied **only** on the *Norton* and *Seven Cases* in framing the intent standard under 35 U.S.C. § 292. *Clontech*, 406 F.3d at 1352-53 (citing and quoting *Norton v. Curtiss*, 433 F.2d 779, 795-96 (C.C.P.A. 1970) and *Seven Cases of Eckman's Alternative v. United States*, 239 U.S. 510, 517-18 (1916)).

[2] *Juniper Networks* noted that in the Ninth Circuit, "fraud-based claims are subject to Rule 9(b)." *Id.* Fifth Circuit law is no different. *Pedroli v. Bartek*, 564 F. Supp. 2d 683, 687 (E.D. Tex. 2008) (allegations "sound[ing] in fraud" are subject to Rule 9(b)); *see* Mot. at 1 (discussing Fifth Circuit law applying Rule 9(b) standards to fraud claims); *accord* Fed. R. Civ. P. 9(b).

Third Party in this context. Relator asked the Court to just erroneously ignore this authority, including the Federal Circuit's definition of the intent standard as "fraudulent." The Court should not do so.

B. Relator Agrees That If Claims Under 35 U.S.C. § 292 Sound In Fraud, The Pleadings Are Governed By Rule 9(b)

Relator admitted that "Rule 9(b) applies . . . to claims 'alleging fraud . . . .'" Opp. at 5 (quoting Fed. R. Civ. P. 9(b)). Relator also did not dispute that Rule 9(b) applies to all claims sounding in fraud. *Pedroli*, 564 F. Supp. 2d at 687. There is no dispute that if false marking sounds in fraud, even Relator concedes that Rule 9(b) applies.

C. Relator's Public Policy Arguments Serve To Validate Defendants' Concerns

Relator made several unsupportable arguments in an attempt to counter Defendants' well-supported public policy concerns. Opp. at 7-8. These arguments lack merit. Relator actually confirmed the concern that lax pleading standards will only encourage additional speculative and conclusory allegations of false marking against other patent owners.

Relator started by "blaming the victims," claiming that the unavoidably burdensome discovery and litigation in this case is a result of the large number of alleged violations. Opp. at 7-8. He missed the point: it is Relator who has burdened the Court and Defendants with thousands of speculative and conclusory allegations based on incorrect legal theories. That Relator made thousands of dubious allegations in "copy-and-paste" fashion does not endow them with merit or require the Court or Defendants to undertake the substantial cost of entertaining and investigating them.

Relator conceded that this case may be a burdensome one for the Court; yet, he claims his burden should be light. *See* Opp. at 12. For example, he did not dispute that the Court must, at a minimum, construe and apply over one hundred independent claims in almost forty patents for Relator's "Scope" counts. But Relator did not support his "Scope" counts with any facts that would demonstrate a plausible entitlement to civil penalties (under any pleading standard). Relator relied exclusively on patent titles, *see* Opp. at 12-13, even though "the Federal Circuit has expressly rejected relying on the patent's title when constructing claims." *Albemarle Corp.*

v. Chemtura Corp., C.A. No. 05-1239-JJB-SCR, 2008 WL 5787779, at *4 (M.D. La. Jan. 24, 2008) (citing *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1312-13 (Fed. Cir. 1999) (patent titles "near[ly] irrelevan[t] . . . to claim construction)).[3]

Relator suggested that the Court use its discretion in managing discovery to prevent him from "searching for a valid particular claim after filing suit." Opp. at 8. This suggestion is meritless. Relator bears a threshold burden to plead a claim **before** there is any discovery. *See United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009) ("Rule 9(b) has long played [a] screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later."); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").[4] Instead, he has burdened the Court and Defendants with thousands of "copy-and-paste" allegations, openly admitting his hope that he will discover supporting facts and hence a case, later. Rule 9(b) exists to prevent exactly this practice, and the Court should not condone it.

Relator's final argument borders on the frivolous. He urged that, because section 292 is a *qui tam* statute, this fact alone "lends further support to applying the general approach of simplified pleadings . . . ." Opp. at 8. The law says otherwise in no uncertain terms. *Qui tam* False Claims Act ("FCA") claims are held to Rule 9(b) standards for sound policy reasons:

> Rule 9(b)[] . . . provides notice of the nature and grounds of the plaintiff's claim, ensuring that a defendant has sufficient information to formulate a defense; it protects defendants from harm to their reputation and goodwill; it reduces the number of frivolous suits; and, it prevents plaintiff's [sic] from filing a claim and then attempting to uncover unknown wrongs through discovery.

United States ex rel. Foster v. Bristol-Myers Squibb Co., 587 F. Supp. 2d 805, 819 (E.D. Tex.

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[3] Relator's assertions of design patent scope fare no better, as the only facts he relied on, again, were patent titles. *See Minka Lighting, Inc. v. Craftmade Int'l, Inc.*, No. 3-00-CV-888-X, 2001 WL 1012685, at *5-6 (N.D. Tex. Aug. 20, 2001) (rejecting claim that a design patent's claims "can be no broader in scope that [sic] its descriptive title").

[4] Courts have sought to avoid such pleading practices by requiring more fulsome pleading, even under minimal pleading standards. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see, e.g., Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008).

2008) (citations omitted). Numerous other binding precedents agree. *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 454 (5th Cir. 2005); *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). The Court should reject Relator's argument that *qui tam* pleadings should be held to lax pleading standards.

II. RELATOR FAILED TO SHOW THAT HIS SPECULATIVE AND CONCLUSORY ALLEGATIONS SATISFY RULE 9(B) STANDARDS

Relator incorrectly claimed that Defendants do not dispute that he adequately pled "a marking importing that an article is patented . . . falsely affixed" to an unpatented article with intent to deceive the public. Opp. at 9. That is not true. Relator failed to cite any portion of Defendants' motion that would support that conclusion, for an obvious reason: Defendants vigorously dispute whether he adequately pled that the accused products were falsely marked by Defendants. *See* Mot. at 5-8.

A. The "Method" Counts Lack Factual Support And Are Legally Incorrect

To defend his "Method" counts, Relator repeated his incorrect legal conclusions that method patents, *per se*, cannot, and do not, cover or protect apparatus, and insisted that those incorrect legal conclusions must be accepted as true on a motion to dismiss. Opp. at 14.[5] Not so. The Court is not required to accept Relator's incorrect legal conclusion that method patents, *per se*, cannot and do not cover or protect an apparatus. *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2007) ("[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)); *Drs. Bethea, Moustoukas Weaver LLC v. St. Paul Guardian Ins.*, 376 F.3d 399, 403 (5th Cir. 2004) (same); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (same).[6]

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[5] Relator's alternative reliance on 35 U.S.C. § 101, Opp. at 14, is unavailing, as illustrated by his own cited precedent. *Westwood Chem., Inc. v. United States*, 525 F.2d 1367, 1379 (Ct. Cl. 1975) ("While processes and products are separate categories of invention . . . nevertheless it is not inconsistent to state that a process and product may present identical issues concerning, *e.g.*, their obviousness.").

[6] For the same reasons, the Court should reject Relator's claim that the application of method claims to an apparatus "raises a question of fact that should not be resolved on a motion to dismiss." Opp. at 15. Relator relied

1. 35 U.S.C. § 287(b)(4)(C) Provides Express Statutory Authorization To Mark Products Made By A Patented Method Of Manufacture

Relator incorrectly argued that the marking provisions of 35 U.S.C. § 287 only apply where "a patentee claims infringement of an apparatus claim in a patent that contains both method and apparatus claims . . . ." Opp. at 17 (emphasis in original). The statute is not so limited. The Patent Act not only allows but encourages owners of such patents to "**mark**[], in the manner prescribed by . . . [35 U.S.C. § 287](a), **the number of the process patent on all products made by the patented process** which have been offered for sale or sold by that person in the United States, or imported by the person into the United States . . . ." 35 U.S.C. § 287(b)(4)(C) (emphases added). This exposes one of the critical legal flaws underlying Relator's incorrect legal conclusion that method patents, *per se*, cannot cover or protect an apparatus.

Relator's opposition did not dispute that each of the so-called "method" patents recites at least one method of manufacture, *i.e.*, a patented process for making a product. This concession is fatal to the "Method" counts because Defendants cannot violate 35 U.S.C. § 292 by complying with 35 U.S.C. § 287(b)(4)(C).

2. Method Of Manufacture Claims Can Protect An Apparatus By Imposing Direct Infringement Liability For Copying That Apparatus

Relator admitted that competitors may directly infringe method of manufacture claims by copying an apparatus. Opp. at 15; *see* Mot. at 6 (citing *Hoover Group v. Custom Metalcraft Inc.*, 66 F.3d 299, 304-05 (Fed. Cir. 1995)). The Federal Circuit in *Hoover* remanded to determine whether a competitor directly infringed method of manufacture claims by copying a patented liquid storage tank. *Hoover*, 66 F.3d at 304. The prospect of direct infringement liability for copying an apparatus confirms that a method of manufacture claim can protect that apparatus.

The *en banc* Federal Circuit recently clarified that, where a method of manufacture is claimed as part of a product-by-process claim, the claim requires **both** the claimed product and

(continued…)

only on the generic legal conclusion that method claims, *per se*, cannot protect an apparatus with no facts of any kind. As such, Relator has not alleged any facts that could be questioned.

the claimed process. *Abbott Labs. v. Sandoz, Inc.*, 2009 WL 1371410, at *10-11 (Fed. Cir. May 18, 2009) (en banc). *Abbott* lends considerable force to Defendants' point that a method of manufacture claim can protect an apparatus, because the Federal Circuit reiterated that the claimed method of manufacture is a critical aspect of a product-by-process claim that cannot be overlooked. *Id.* Relator misinterpreted *Abbott* when he claimed a product-by-process claim protects "only the claimed process, and not the articles produced by that process." Opp. at 16.[7]

Hoover and *Abbott* illustrate an obvious principle of law: method of manufacture claims protect an apparatus because a competitor may be liable for direct infringement by copying the apparatus using a claimed method of manufacture.

The Court should dismiss the "Method" counts for at least two additional reasons: Relator's generic legal conclusion that method patents, *per se*, cannot protect an apparatus is wrong as a matter of law, and it is undisputed that all the so-called "method" patents at issue recite at least one method of manufacture claim, which definitely **can** protect an apparatus under *Hoover* and *Abbott*. At the very least, Relator must plead facts sufficient to support an inference that the accused products are not protected by any of the claimed methods of manufacture, which he has failed to do.

B. The "Scope" Claims Lack Any Supporting Facts And Are Legally Flawed

1. Relator Improperly Suggested That Defendants Should Identify The Factual Basis For His "Scope" Claims

Remarkably, Relator now has attempted to shift his burden of pleading to the Defendants, claiming that it is Defendants' obligation to "identify and review the patents and to evaluate the claims asserted therein." Opp. at 12. This is an extraordinary and unacceptable proposition. Relator bears the burden to plead facts to support his claims that certain patents have certain scope. *Thompson*, 125 F.3d at 903 (Rule 9(b) requires pleading "who, what, when, where, and

[7] Neither *NTP*, *Inpro II Licensing* nor *Astrazeneca* are relevant to whether competitors can directly infringe a method of manufacture claim or indirectly infringe a method claim by copying an apparatus. *See NTP Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1288-89, 1318 (Fed. Cir. 2005) (claimed method for transmitting information in an electronic mail system; no direct infringement in United States precluded indirect inducement or contributory liability); *Inpro II Licensing, S.A.R.L. v. T-Mobile USA, Inc.*, 450 F.3d 1350, 1352 (Fed. Cir. 2006) (credit-card sized PDA claimed; no indirect infringement at issue); *Astrazeneca AB v. Mutual Pharm. Co.*, 384 F.3d 1333, 1335 (Fed. Cir. 2004) (chemical compounds claimed; no indirect infringement at issue).

how" of an alleged fraud); *see also Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997) (same); *accord Bell Atl.*, 550 U.S. at 570; *Ashcroft*, 129 S. Ct. at 1950. Defendants are not obligated to guess the purported basis of the claims.

2. Relator Identified No Facts That Support His "Scope" Allegations

Relator failed to allege a single relevant fact that would support his claims that certain patents have certain scopes. He admitted that he alleged **only**: (1) patent number, (2) patent title, (3) date of issuance and (4) alleged expiration date. Opp. at 12. **None of these alleged facts provides any basis to infer patent scope**. *See Albemarle*, 2008 WL 5787779 at *4; *Pitney Bowes*, 182 F.3d at 1313; *see also Minka Lighting*, 2001 WL 1012685 at *5-6.

Relator referenced Count 173, which he called the "Venus Vibrance Exfoliates 4 pack cartridge" product, as an alleged example that he has met his burden of pleading. He identified only a title, "Razor Handle," as alleged support. Opp. at 13. This was plainly inadequate to support any inferences of patent claim scope. *Albemarle*, 2008 WL 5787779 at *4; *Pitney Bowes*, 182 F.3d at 1313. Nor do Relator's superficial allegations of design patent scope survive scrutiny. Opp. at 13. He relied exclusively on patent titles. *Id.* This is an insufficient basis to support any inference of patent claim scope. *Minka Lighting*, 2001 WL 1012685 at *5-6.

The Court should dismiss the "Scope" counts because they are not pled with particularity.

3. Relator's "Scope" Theory Contradicts Federal Circuit Law

Relator's opposition revealed that his "Scope" theory is that a patent can only "protect" an apparatus that falls within the literal scope of its claims. *See* Opp. at 12-13. In taking this artificially narrow approach, Relator overlooked established law holding that patent owners may mark "unpatented" products to give notice to the public of potential indirect infringement liability. This law specifically holds such practice is **not** in violation of 35 U.S.C. § 292.

The Federal Circuit's decision in *Amsted Indus., Inc. v. Buckeye Steel Castings Co.* reveals that Relator's "Scope" theory is incorrect as a matter of law. 24 F.3d 178 (Fed. Cir. 1994). There, the infringer was liable only for contributory infringement when it sold unpatented center plates for use in a patented combination. *Id.* at 185. Because the patent owner failed to mark its own **unpatented** center plates, the Federal Circuit held it failed to "notify[] the public concerning the patent status of [unpatented] items in commerce[,]" and barred it from collecting damages under 35 U.S.C. § 287. *Id.* The court rejected as "not persuasive" the very argument Relator makes here, namely, that had the patent owner marked the unpatented center plates, it would have violated 35 U.S.C. § 292. *Id.*[8]

Under Relator's "Scope" theory, the patent owner in *Amsted Industries* would have violated 35 U.S.C. § 292 because the unpatented center plates did not fall within the literal scope of the claims. Relator did not dispute that indirect infringement liability may arise through the sale of an unpatented apparatus. *See* Opp. at 17. Notwithstanding the prospect of such liability, Relator insisted that only products falling within the literal scope of a patent's claims can be marked. That is logically inconsistent and, indeed, it is not the law. *Amsted Indus.*, 24 F.3d at 185; *cf.* 35 U.S.C. § 287(b)(4)(C).

The Court should dismiss the "Scope" counts because they rely on a legal theory that is contrary to Federal Circuit law.

C. Relator Failed To Plead Facts To Support The "Expiration" Counts Under His Expiration Theory

Relator seemed to understand that he must allege the time of initial marking in order to plead false marking with particularity under his "Expiration" theory. *See* Opp. at 11. Relator, however, then confused the issues of pleading and proof, not Defendants. *Id.* To plead with particularity, Relator must **plead** the "who, what, when, where, and how" of an alleged fraud. Mot. at 1 (quoting *Thompson*, 125 F.3d at 903 (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997))).

Relator freely admitted that he equates the presence of a product on a shelf with the time of initial marking, which he must to justify his "Expiration" theory. Opp. at 11. This is an impermissible inference, as illustrated by Relator's featured example of Count 543 and U.S.

[8] The Federal Circuit provided exemplary ways that the patent owner could have marked its unpatented center plates. *See id.* ("for use under U.S. X,XXX,XXX"; "licensed under U.S. X,XXX,XXX"). By no means did the court limit acceptable markings to that specific language, which the court found "would have fulfilled the policy goal of notifying the public concerning the patent status of [unpatented] items in commerce." *Id.*

Patent No. 4,170,821 (the "'821 patent"). *See* Opp. at 10. Relator claimed that "it 'would stretch the imagination' to infer that a product that in 2008 bore the number of a patent that [allegedly] expired in 1997 was marked before the patent expired and simply sat on the retailer's shelf for eleven years before being discovered by Mr. Pequignot." *Id.* at 11.[9]

Far from it. On its face, the packaging Relator references in Count 543 shows a copyright date of 1993, which is well before the alleged expiration date in 1997. (Dkt. # 8, Exh. KK.) There is no reason, in view of this fact, to infer that the product was initially marked after expiration under Relator's "Expiration" theory, and Relator certainly offered none.

This example highlights the shortcomings of the amended complaint: Relator did not plead his allegations with sufficient particularity to allow Defendants and the Court to understand their basis. Relator failed to allege that any products were initially marked after expiration under his "Expiration" theory, because he did not allege **any** time at which the products were initially marked, other than speculative and conclusory allegations that marking might have first happened after expiration. The Court is not required to accept such inappropriate inferences as true on a motion to dismiss. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 364 n.4 (5th Cir. 2003) ("unwarranted deductions of fact" not accepted as true); *Kane Enterprises v. MacGregor USA Inc.*, 322 F.3d 371, 374 (5th Cir. 2003) (same).

The Court should dismiss the "Expiration" counts because they are not pled with particularity.

D. Relator Did Not Justify His "Information And Belief" Pleadings

Relator claimed that he properly pled certain facially speculative allegations "upon information and belief." Opp. at 20-22. Relator is wrong. *Juniper Networks*, 2009 WL 1381873 at *4 (rejecting "information and belief" allegations that defendant "knew" marking to be false under Rule 9(b)). (Exh. 1.)

[9] Relator's reliance on *Grubbs* is unavailing. In *Grubbs*, the *qui tam* FCA relator pled, in detail: (1) the date; (2) the place; (3) the participants; (4) the details of the fraud scheme; (5) how others sought to effectuate the fraud scheme; and (6) the specific dates on which (7) actual false claims of providing medical services were made (often providing types of medical services claimed to have been provided as well as specific codes used in the bill). *Grubbs*, 565 F.3d at 191-92. Relator has come nowhere close to this level of particularity.

Relator first cited cases stating that patent assignees "hold[] all legal rights to a patent" as a basis to infer that Defendants knew of alleged expiration dates. Opp. at 20-21. He failed to explain any connection between the two principles and Defendants cannot find one.

Relator stated that, as Defendants are sophisticated companies, they must be charged with knowledge of the alleged expiration dates. Opp. at 21. This is just another speculative and conclusory allegation that does not meet Rule 9(b) standards. *Juniper Networks*, 2009 WL 1381873 at *4. (Exh. 1.) Relator pointed to the "sheer length of time" since the alleged expiration dates to support the inference that Defendants knew of the alleged expirations. Opp. at 21. Even if the patents have expired, that fact has no bearing on his "Expiration" allegations, because he has pled no facts to support an inference that Defendants initially marked any product with an expired patent number, post-expiration, under his "Expiration" theory.

Relator asserted that his facially speculative claims that Defendants "knew" certain products were allegedly mismarked were proper. Opp. at 21. This only presumes the adequacy of his "Expiration," "Method" and "Scope" allegations. These underlying allegations are inadequately pled. Absent any foundation, the Court should reject Relator's facially speculative allegations of Defendants' "knowledge." *See Juniper Networks*, 2009 WL 1381873 at *4 (conclusory allegations that defendant "knew" marked product not covered by patent rejected under Rule 9(b)). (Exh. 1.)

E. Relator Has Not Pled Circumstances That Would Permit Generalized Allegations Of Intent

Relator failed to plead any circumstances that would support an inference that Defendants acted with fraudulent intent. *See Juniper Networks*, 2009 WL 1381873 at *4 (Exh. 1.) Relator's support of the intent allegations turns on the purported adequacy of his "Expiration," "Method" and "Scope" allegations, *see* Opp. at 19, but these underlying allegations are inadequately pled.

Relator attempted to make up in number what he lacks in substance by claiming that the large number of alleged violations should give rise to an inference that Defendants acted with fraudulent intent. Opp. at 19-20. Once more, he is wrong. First, Relator must plead facts sufficient to allege fraudulent intent for **each** individual allegation of false marking. Second, repetition of the same speculative and conclusory allegations does not create merit, nor does the number of his allegations give rise to any inference of any kind. If it did, every fraud complaint would be inches thick to take advantage of this theory.

III. CONCLUSION

Relator has burdened the Court and Defendants with literally thousands of speculative and conclusory allegations of false marking, which is fraud, without complying with Rule 9(b). He asked the Court and Defendants to weed through them, while he refused to identify any facts that would support them, and ignored their incorrect legal basis. Worse, he admitted that he seeks to use discovery to find evidence to support them. The very "examples" he identified illuminate the unsubstantiated nature of his allegations, and the law he cited vitiates the flawed legal theories behind them.

Rule 9(b) exists to prevent the type of unsubstantiated and speculative pleading in this case. The Court should dismiss the amended complaint.

Dated: June 26, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 26th day of June, 2009.

/s/ David M. Maiorana
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